

STATE OF WISCONSIN

CIRCUIT COURT
Branch 2

POLK COUNTY

James Urban et al,

Plaintiffs

DECISION ON PETITION
FOR REVIEW

vs.

Wisconsin Department of Commerce,
Defendant

File No.: 03 CV 76

Petitioner seeks review of the decision of an Administrative Law Judge (ALJ) denying petitioner's claim for reimbursement of \$500.00 in fees paid to the DNR for a landspreading review and permit, and reimbursement for interest and bank fees associated with said landspreading review and permit fees in the amount of \$130.98.

The appropriate standard for review is §227.57(4) Wis. Stats. which provides as follows:

The Court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

There is no dispute that on August 1, 2002 the ALJ who ultimately rendered the decision in this case a month later had an ex parte communication which lasted 2-2½ hours with Eric Scott, an employee of the respondent. The parties, however, disagree as to whether this conversation impaired either "the fairness of the proceedings" or "the correctness of the action". The parties further disagree as to whether the ALJ's ex parte communication with Scott constituted a "material error in procedure or a failure to follow prescribed procedure".

There is no dispute that the ex parte communication was instigated by and/or solicited solely by the ALJ. There is no record with regard to the content of the ALJ's conversation with Scott except for Scott's affidavit. The ALJ did not file a memorandum in the record as to the ALJ's version of the substance of the communication.

This court finds that the ALJ's ex parte communication with Scott was not harmless error. This court finds that said ex parte communication constituted a material error in procedure and that said ex parte communication constitutes a failure to follow prescribed procedure.

The petitioner also argues that the ALJ's decision is incorrect and clearly erroneous. Because this court finds that this case is properly remanded for a new hearing by a different ALJ, this court will not address whether the ALJ's original decision was incorrect and/or clearly erroneous.

In this case the ALJ's actions in soliciting and instigating the communication with Scott and thereafter failing and/or refusing to file a memorandum with regard to the content of said communication as required by §227.50(2), is an affront to principles of fundamental fairness and the fundamental requirements of due process. ALJ White's file memorandum dated September 10, 2002 (R.94-95) and the ALJ's self-serving conclusion that "the information to which the Administrative Law Judge had access did not influence or have any bearing on the Administrative Law Judge's decision" is self-serving, not controlling and will be given no deference by this court.

The respondent's own counsel was so offended by and concerned about the manner in which the ALJ's *ex parte* communication would likely undermine the integrity of this process that said counsel moved for dismissal of the case.

The process of hearings and decisions before Administrative Law Judges must not only be fair but must also have the appearance of fairness. Here, the process had neither.

The appropriate remedy under all of the circumstances is to remand this matter to the respondent for a new hearing in front of a different ALJ.

IT IS SO ORDERED.

Dated: December 9, 2003.

BY THE COURT:



Robert H. Rasmussen

Circuit Court Judge – Branch 2

cc: John Van Lieshout
Stephen J. Nicks

Ref: 001208.11